No. 15,970

IN THE

United States Court of Appeals

For the Ninth Circuit

SALLY CHRISTY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

Appellant was seen at 2:00 A. M. on the night of April 2, 1957, in the rear seat of a taxi parked with

other cabs in front of the Silver Dollar Bar, Fairbanks, Alaska. Ralph V. Robinson and two fellow soldiers, Roger Akervik and George McCraw, left the Silver Dollar Bar about that time and approached the taxi in which appellant was seated. Witness Robinson testified as to what followed.

> A. As we approached the same cab with the woman in it, the woman got out of the cab. I asked her where she was going, and she asked me how much money I had, and then I asked her what it would cost, and she said $10, so I asked my two friends if they wanted to go, and both of them said no. So I only had five dollars, so I borrowed five from my buddy, Akervik, and we all got in the cab; Akervik, McCraw and the driver in the front seat, and myself and the girl in the back seat.
>
> Q. And then what took place, if anything?
>
> A. I gave the girl five dollars and we backed out, went down Cushman toward Three Mile Gate, and she told me to take down my pants, and I didn't think we had enough time from there to the Three Mile Gate to do the job. She took off her coat and her pants, and she wanted the other five dollars, and I didn't think we had enough time, so she asked the driver how long it would take us to get to the gate, and he said, "Five minutes or twenty minutes." So my pants had been down, and I gave her the other five dollars, and she said, "It ought to be worth it; that she was going down on it."
>
> Q. And then what, if anything, happened?
>
> A. She took my penis and put it in her mouth, . . . (TR 7-8.)

The evening's events were interrupted by Deputy Marshal Melville R. McRoberts and Special Agent Richard Hopkins of the Office of Special Investigations, United States Air Force, who pulled alongside and signaled the traveling taxi to stop. (TR 55). Appellant had been under the surveillance of these law enforcement agents as she waited in front of the Silver Dollar Bar. When the servicemen entered her taxi and it pulled away, McRoberts and Hopkins followed in a police car, observing the occupants of the taxi through its rear window. They followed for approximately three miles before stopping the taxi, and, after identifying himself, McRoberts asked Robinson to get out. (TR 34-39, 51-55.) The taxi drove on and Robinson was taken to the Federal Building in Fairbanks to make a statement. (TR 17.) Appellant was arrested the next day; was tried for unnatural carnal copulation; and convicted in the United States District Court, Fourth Judicial Division, District of Alaska.

QUESTIONS PRESENTED.

Whether the testimony of accomplice Robinson was sufficiently corroborated to support the jury's verdict of guilty.

Whether the Court erred in its instructions on accomplices or in giving additional instruction to the jury after the jury reported they were deadlocked.

Whether the trial Court properly admitted government's Exhibit "A" consisting of a judgment of a

prior conviction of attempt to commit the crime of unnatural carnal copulation and an amended judgment reducing the punishment for the conviction.

ARGUMENT.

I.

THE TESTIMONY OF ACCOMPLICE ROBINSON WAS SUFFICIENTLY CORROBORATED TO SUPPORT THE JURY'S VERDICT OF GUILTY.

The story as told by Robinson was corroborated by the testimony of at least three other witnesses. George McCraw's account of first seeing appellant in a parked taxi and of Robinson's negotiations with her are the same as told by Robinson. (TR 28.) McCraw, as he rode in the front seat of the taxi, heard appellant tell Robinson to take his pants down. (TR 28.) McCraw related at the trial that after the police asked Robinson to leave the taxi:

> . . . the lady said she was afraid he would talk, and the cab driver said he didn't think he would, so she asked us then did we have any money on us, so I told her no. Akervik said he had a little, so she asked him would he hide it and she asked us what our names were. (TR 29.)

Special Agent Hopkins and Deputy Marshal McRoberts both observed the three soldiers, Robinson, Akervik and McCraw, get into the taxi in which appellant was sitting. (TR 35, 49, 51, 52.) The police officers followed on the highway at a distance of about ten feet at one point. Their headlights were on high

enabling them to see the occupants through the rear window of the taxi. (TR 36, 38, 42, 53.) Appellant and Robinson were seen sitting close together as if they were making love in the rear seat. (TR 37.) Both McRoberts and Hopkins saw a hand go up behind the appellant's head and her head disappear in a downward direction. (TR 37, 55.) Hopkins testified appellant remained out of sight for three to five minutes and that she did not reappear until the police car in which he was riding pulled next to the taxi and a spotlight was directed into the back seat. (TR 37, 48.) McRoberts testified that Robinson's pants were completely unzippered when he stepped out of the taxi and stood on the highway. (TR 56.)

Under the laws of Alaska a conviction can be had upon the testimony of an accomplice only if the testimony be corroborated by such evidence as tends to connect the defendant with the commission of the crime. ACLA 1949, § 66-13-59. The reason for the rule is to safeguard defendant from a conviction based solely upon the evidence of accomplices. But this reason does not demand that the accomplice be corroborated in every part of his testimony or that this corroborating testimony be sufficient by itself to support a conviction. *People v. Becker,* 215 N.Y. 126, 109 N.E. 127; *State v. Kent,* 4 N.D. 577, 62 N.W. 631. In *People v. Taylor,* 30 Cal. App. 239, 232 P. 998, the Court stated that the test for corroboration is met even if it is evidence which is "slight and entitled, when standing alone, to but little consideration". Corroboration can be had from circumstantial

as well as direct evidence. Inferences from all the circumstances surrounding the criminal transaction are accepted as meeting the requirements for corroboration. *Stanley v. U. S.,* 245 F. 2d 427, mot.den., 249 F. 2d 64; *State v. Brazell,* 126 Ore. 579, 269 P. 884; *People v. Morris,* 110 C.A. 2d 469, 243 P. 2d 66.

II.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON ACCOMPLICES OR IN GIVING AN ADDITIONAL INSTRUCTION AFTER THE JURY REPORTED THEY WERE DEADLOCKED.

Appellant has complained on appeal that the Court erred in giving instruction No. 8 because that instruction did not inform the jury that Robinson was an accomplice as a matter of law. Questions of fact must be submitted to the jury for their determination. Where there is a dispute whether the witness did certain things which would make him an accomplice, a question of fact arises. *People v. Coffey,* 161 Cal. 433, 119 P. 901. Here the question as to whether witness Robinson participated in an act of unnatural carnal copulation with the appellant was disputed by appellant herself (TR 104-106), and was the very point in issue in the case. The Court properly instructed the jury, touching on the law concerning accomplices, and left the question whether or not prosecution witness Robinson was an accomplice for the jury to decide. *People v. Featherstone,* 67 Cal. App. 2d 793, 155 P. 2d 685. An instruction by the District Court that Robinson was an accomplice as a matter of law would

have been an expression by the Court as to what had been proved in the case, and consequently an usurpation of the jury's duty to weigh and decide the facts of the case. ACLA 1949, § 66-13-62, § 66-13-63; *Brock v. State,* 91 Ga. App. 141, 85 S.E. 2d 177.

As to the occupants in the taxi, the Court was not required to instruct the jury that they might have been accomplices. Akervik's action of declining to participate in a sexual act with appellant, and thereafter lending Robinson five dollars ($5.00) to pay his fee to the appellant for the same act, (TR 7, 21, 28) is not sufficient involvement to make Akervik an accomplice. To establish the relationship of accomplice, two or more persons must unite in a common purpose to do an unlawful act. *Johnson v. U. S.,* 195 F. 2d 673. There must be a showing that not only did the alleged accomplice aid the principal but that at the same time he shared the criminal intent of him who actually committed the offense. *People v. Hill,* 77 Cal. App. 2d 287, 175 P. 2d 45.

However, even if Akervik were to be considered an accomplice, *People v. Goldstein,* 146 Cal. App. 2d 268, 303 P. 2d 892, as cited by appellant on pages 19 and 20 of her brief to support a contention of reversible error, is not in point. In the *Goldstein* case the Court of Appeals of California reversed the judgment of the lower Court for the Court's failure to give instructions on accomplices. In that case the Court of Appeals ruled that if the jury had found the third person in question to be an accomplice, there would not have been sufficient evidence to uphold the con-

viction. In the instant case, however, Akervik's testimony is merely a duplication of the testimony given by his companion, McCraw. The record of the trial here reveals no acts of McCraw by which he aided, abetted, or advised the participants in the act of unnatural carnal copulation. McCraw's testimony, added to that of McRoberts and Hopkins, supplies the corroboration which was lacking in the *Goldstein* case.

Appellant at the time of trial neither made objection to instruction No. 8 nor made request for an instruction on Akervik or McCraw as accomplices. (TR 141.) Such objections, in the absence of clear error, are required for a reversal on appeal. *Herzog v. U. S.,* 226 F. 2d 561, opinion adhered to 235 F. 2d 664, cert. den. 77 S.Ct. 54, 352 U.S. 844, 1 LEd 2d 59; *Bryson v. U. S.,* 238 F. 2d 657, reh. den. 233 F. 2d 837, cert. den. 78 S.Ct. 20, 355 U.S. 817, 2 LEd 2d 34, reh. den. 78 S.C. 138, 355 U.S. 879, 2 LEd 2d 110; *Pitts v. U. S.,* 237 F. 2d 217.

The Court's instruction, titled "Additional Instruction to the Jury", cited by appellant as reversible error was given to the jury when its members reported they were deadlocked in reaching a verdict. (TR 145, 146, and quoted on pages 15-17 of appellant's brief.) This instruction has been approved by the Court of Appeals for the Ninth Circuit in *Hutson v. U. S.,* 238 F. 2d 167.

III.

THE TRIAL COURT PROPERLY ADMITTED GOVERNMENT'S EXHIBIT "A" CONSISTING OF A JUDGMENT OF PRIOR CONVICTION OF AN ATTEMPT TO COMMIT THE CRIME OF UNNATURAL CARNAL COPULATION AND AN AMENDED JUDGMENT REDUCING THE PUNISHMENT FOR THE CONVICTION.

It is appellant's contention that it was reversible error for the trial Court to admit government's Exhibit "A" into evidence because, first, its purpose was to impeach the testimony of appellant when in fact there was nothing to impeach since appellant admitted her prior conviction on direct examination. As a second ground of error it is argued that the judgment had attached a notation as to the punishment awarded on the prior conviction.

On direct examination, appellant testified to a prior conviction. The offense was described by appellant as follows, "It was a morals charge here in Fairbanks several years ago. It had to do with going out with men." (TR 116.) In fact, as government Exhibit "A" showed, appellant had previously been convicted of a felony, to-wit, an attempt to commit the crime of unnatural carnal copulation.

Appellant's argument that the trial Court erred in permitting the government to introduce a record of conviction after appellant had admitted a conviction is based on the premises that the government is bound by such an admission of defendant and is foreclosed from presenting any further proof of conviction. Even if the trial Court was satisfied that the definition, "going out with men", be a sufficient statement

to apprise the jury that the appellant had been convicted of an attempt to commit the crime of unnatural carnal copulation, the government still had a right to introduce proof of a prior conviction. *Adamson v. People State of Calif.,* 67 S.Ct. 1672, 332 U.S. 46, 91 LEd 1903, reh. den. 68 S.Ct. 27, 332 U.S. 784, 92 LEd 367; *Bohol v. U. S.,* 227 F. 2d 330; *State v. Holloway,* 355 Mo. 217, 195 S.W. 2d 662. The government can introduce information from any part of the record for conviction including the punishment given. *Nichols v. Commonwealth,* 283 S.W. 2d 184; *White v. Commonwealth,* 312 Ky. 543, 228 S.W. 2d 426. Impeachment by a record of conviction is permitted by § 58-4-61, Alaska Compiled Laws Annotated, 1949. *Meeks v. U.S.,* 163 F. 2d 598.

Appellant supports contention of error by citing cases where the trial Court was overruled for entertaining questions by the jury concerning punishment. *Sukle v. People,* 107 Col. 269, 111 P. 2d 233, *Commonwealth v. Mills,* 350 Pa. 478, 39 A. 2d 572. These cases refer to a direct instruction by the Court in response to situations where the record shows the mind of the jury was entertaining the question of punishment as a factor in reaching a verdict. No such showing is made by the record here.

CONCLUSION.

For the reasons set forth above, appellee requests this Court to affirm the judgment of the District Court.

Dated, Fairbanks, Alaska,
August 11, 1958.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

ALASKA COMPILED LAWS ANNOTATED, 1949.

§ 58-4-61. IMPEACHMENT BY ADVERSE PARTY: EVIDENCE PERMISSIBLE. A witness may be impeached by the party against whom he was called, by a contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts; except that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime.

§ 65-9-10. UNNATURAL CRIMES: That if any person shall commit sodomy, or the crime against nature, or shall have unnatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished by imprisonment in the pentitentiary not less than one year nor more than ten years.

§ 66-13-59. CORROBORATION OF TESTIMONY OF ACCOMPLICE. That a conviction can not be had upon the testimony of an accompdice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.

§ 66-13-62. QUESTIONS OF LAW FOR COURT: DECLARING KNOWLEDGE OF

COURT. That all questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to it; and whenever the knowledge of the Court is by this act made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it as conclusive.

§66-13-63. JURY TO RECEIVE LAW FROM COURT AND DECIDE QUESTIONS OF FACT. That although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound nevertheless, to receive as law what is laid down as such by the Court; but all questions of fact other than those mentioned in the last section must be decided by the jury, and all evidence thereon addressed to them.